

FILE

## EASTMAN &amp; SMITH LTD.

ATTORNEYS AT LAW

Established 1844

D. Casey Talbott  
Attorney at Law  
Direct Dial: 419-247-1845  
dctalbott@eastmansmith.com

One SeaGate, 24<sup>th</sup> Floor  
P.O. Box 10032  
Toledo, Ohio 43699-0032  
Telephone: 419-241-6000  
Facsimile: 419-247-1777

July 6, 2009

Via Hand-Delivery

The Public Utilities Commission of Ohio  
Docketing Division  
180 East Broad Street  
Columbus, OH 43215-3793

RECEIVED-DOCKETING DIV  
2009 JUL -6 PM 4:33  
PUCO

Re: In the Matter of the Authorization of Wheeling and Lake Erie Railway and  
Norfolk and Southern Railway to Construct Active Grade Crossing  
Warning Devices in Crawford, Preble, and Montgomery Counties.  
PUCO Case No. 08-574-RR-FED  
Our File No: N1432/176814

Dear Docketing Clerk:

Enclosed for filing are an original and seven (7) copies of Norfolk Southern Railway Company's Application for Rehearing of the Commission's Entry of June 3, 2009.

Please call me – at (419) 241-6000 – if you have any questions or concerns.

Thank you.

Very truly yours,

EASTMAN & SMITH LTD.

D. Casey Talbott / By Mark Shaw

D. Casey Talbott

DCT/kml  
Enclosures

cc: Ms. Leah Thomas Dalton (w/enc.)  
Ms. Susan Kirkland (w/enc.)  
Mr. Rick Ray (w/enc.)  
City of West Carrollton (w/enc.)

This is to certify that the images appearing are an  
accurate and complete reproduction of a case file  
document delivered in the regular course of business.  
Technician SM Date Processed JUL 07 2009

Columbus • Toledo • Findlay • Novi

[illegible][illegible]

Case No. 08-574-RR-FED

**APPLICATION FOR**  
**REHEARING OF THE**  
**COMMISSION'S ENTRY OF**  
**JUNE 3, 2009**

**D. Casey Talbott (0046767)**  
:  
**(Trial Attorney)**  
**Mark W. Sandretto (0079536)**  
:  
**EASTMAN & SMITH LTD.**  
**One SeaGate, 24<sup>th</sup> Floor**  
:  
**P.O. Box 10032**  
**Toledo, Ohio 43699-0032**  
:  
**Telephone: (419) 241-6000**  
**Fax: (419) 247-1777**

**Attorneys for Norfolk Southern  
Railway Company**

Pursuant to R.C. 4903.10 and O.A.C. 4901-1-35, and by and through counsel, Norfolk Southern Railway Company respectfully applies for a rehearing with respect to the Commission's Entry of June 3, 2009 – more specifically, with respect to the “notice” set forth in numbered paragraph (8) of the Entry.

1

Respectfully submitted,

EASTMAN & SMITH LTD.

*D. Casey Talbott / 27 March 2009*  
*0059713*

D. Casey Talbott (0046767)  
Mark W. Sandretto (0079536)  
One SeaGate, 24<sup>th</sup> Floor  
P.O. Box 10032  
Toledo, Ohio 43699-0032  
Telephone: (419) 241-6000  
Fax: (419) 247-1777

Attorneys for Norfolk Southern  
Railway Company

## **MEMORANDUM**

### **Background:**

By Entry of May 28, 2008, the Commission authorized Norfolk Southern to install active warning devices at the Kimberly Road crossing (DOT# 524-642M) in West Carrollton, Montgomery County, Ohio, with construction to be completed by May 28, 2009.

Norfolk Southern thereafter performed the requisite engineering, submitted the related plans and cost estimates for approval, and upon receiving same, undertook the necessary steps toward proceeding with construction. As of May of 2009 construction was substantially completed – e.g., Norfolk Southern had performed the requisite foundation work, installed the involved cable and control circuitry, and installed and tested the active warning devices themselves, which were then bagged pending final completion. Up until this point, Norfolk Southern had understood that construction was on target to be completed within the original deadline – that is, by May 28, 2009.

Unfortunately, on May 26 or 27, 2009 (meaning just a day or two before the assigned deadline, and thus beyond the technical deadline by which any timely extension request could be filed), Norfolk Southern became aware that there had been a communication breakdown within Norfolk Southern, between two departments involved in the project, and that it did not have on-hand certain special-order insulated joints (which confine the detection circuitry to the immediate area of the crossing, and the installation of which would have been the final necessary piece of the construction project, for proper operation of the warning devices), which served to preclude Norfolk Southern from complying with the original deadline.

After conferring with Commission Staff (and notwithstanding that it was technically beyond the deadline for filing a timely extension request), Norfolk Southern filed a formal Request for Extension, so as to alert the Commission of the issue, to enable the Commission to monitor same. Although Norfolk Southern requested a fourteen (14) day extension of the construction deadline, Norfolk Southern thereafter did everything within its power to complete the project as expeditiously as possible (*e.g.*, it arranged to retrieve the special-order insulated joints, and then redirected its personnel to the construction site to finalize installation), with the project ultimately being completed, and the crossing thereby placed in-service, on June 1, 2009, meaning just four (4) days beyond the original construction deadline.

Commission Staff was kept apprised of Norfolk Southern's activities from the moment Norfolk Southern became cognizant that there was a problem here, through the moment the problem was resolved, and the crossing thus placed in-service. (See, *e.g.*, the e-mail strings which are attached as Exhibits A and B, together with the in-service letter of June 1, 2009, attached as Exhibit C.)

On June 3, 2009, the Commission issued its Entry (attached as Exhibit D) which summarized the involved facts, and noted that Norfolk Southern's extension request was deficient since it was not timely filed and, further, it did not clearly state the reasons prompting the request. At paragraph (7), the Commission noted that, per Commission Staff, it understood that the active grade crossing warning devices had in fact been placed in-service as of June 1, 2009 (again, four days after the original deadline). At paragraph (8), however, the Commission stated as follows:

- (8) NS is hereby put on notice that, in the future, all grade crossing improvement projects are to be completed, absent extraordinary circumstances, in the time set forth by the Commission. In the event NS fails to timely complete a grade crossing project in the future as ordered by the Commission, the Commission will consider imposing a civil forfeiture pursuant to Section 4905.47 (*sic*), Revised Code.

Norfolk Southern respectfully applies for a rehearing with respect to the "notice" set forth in paragraph (8), above – more specifically, with respect to whether the issuance of the notice was reasonable and appropriate in the instant circumstances.

**Analysis:**

Norfolk Southern does not and cannot contest the main factual findings set forth in the Commission's Entry of June 3, 2009 – that is, that Norfolk Southern did not complete construction within the original one year construction deadline and, when its personnel realized that compliance within the deadline would not be possible (again, due to the internal communication breakdown), that Norfolk Southern was beyond the Commission's deadline for filing a timely extension request.

For the following reasons, however, Norfolk Southern respectfully submits that, in the instant circumstances, the issuance of the above-referenced notice was unreasonable, or at least unnecessary.

First, Norfolk Southern assures the Commission that it is taking appropriate action, internally, toward ensuring that its involved departments are cognizant of and docketing the Commission's construction deadlines – with respect to both completion and extension requests, assuming necessary, toward minimizing the possibility that what happened here will reoccur.

Second, Norfolk Southern's failure to comply with the original construction deadline in this instance was not willful but, rather, inadvertent, and due to an acknowledged communication breakdown.

Third, and importantly, from the very moment that Norfolk Southern became cognizant that it had a problem here, Norfolk Southern handled this matter exactly as the Commission would have wanted it to – that is, it did not ignore the problem and/or cower from it (nor did it attempt to proffer any external excuse for non-compliance); rather, and immediately upon becoming cognizant of the problem (again, on May 26 or 27, 2009), Norfolk Southern took appropriate action in conferring with Commission Staff (see, *e.g.*, Exhibit A, attached), and filed a formal Request for Extension so as to alert the Commission of the issue, to enable the Commission to monitor same. At the same time, Norfolk Southern involved all of its departments, at the necessary levels, to complete the construction project as expeditiously as possible, with ultimate construction being completed – and the crossing placed in-service – just four (4) days after the expiration of the original construction deadline, meaning ten (10) days ahead of the deadline sought via the Request for Extension. Norfolk Southern kept the Commission Staff apprised

throughout the entirety of this process, and notified Commission Staff the very moment the problem was resolved, and the crossing placed in-service. (See Exhibits B and C, attached.)

In other words, and notwithstanding that Norfolk Southern no doubt bears responsibility for the original communication breakdown, Norfolk Southern thereafter handled this in the exact manner which the Commission would and should encourage.

For the foregoing reasons, Norfolk Southern respectfully applies for a rehearing with respect to the issuance of the notice set forth in paragraph (8) of the Commission's Entry, which might appear reasonable and appropriate in certain circumstances (*e.g.*, where there was a willful and/or egregious violation of an assigned deadline, or in the absence of appropriate remedial action such as that Norfolk Southern took in the instant case), but not here, in the absence of any willful and/or egregious violation, and particularly in light of the remedial action which Norfolk Southern did in fact take, with ultimate completion occurring just four (4) days beyond the original deadline.

Further, Norfolk Southern remains concerned that the standard one year construction deadline is somewhat ambitious, meaning a lot of things have to fall into place to enable compliance, with very little to no margin of error. By way of example, and after the clock starts ticking, engineering plans must be prepared, submitted, and then approved by the appropriate regulatory agency, and only then can materials be ordered and meaningful dialogue commence with any necessary parties (within or outside Norfolk Southern), toward actual construction. The construction process itself is then quite taxing, as in the ordinary course, and with increasing frequency, issues commonly arise and must be resolved involving, *e.g.*: 1) preemption of highway traffic signals; 2) consolidation of roadways (*e.g.*, if a roadway must be closed before an adjacent crossing can be improved); 3) progression of related highway projects; and 4) communication and

related interplay with any involved utility companies (*e.g.*, with respect to relocating underground and/or overhead conflicts, and in securing AC power to the construction site), local authorities (*e.g.*, with respect to requisite roadway construction and/or curb work), and/or local landowners (*e.g.*, with respect to easements and access). Stated another way, and even in the absence of "extraordinary circumstances," as referenced in paragraph (8) of the Commission's Entry, circumstances can and do arise which necessitate some reasonable extension of an original construction deadline.<sup>1</sup>

Finally, and as the Commission is presumably aware, during the past ten years Norfolk Southern has participated in 378 separate crossing projects throughout the State of Ohio, dedicating significant manpower and resources (including multi-millions of dollars funded by Norfolk Southern, far exceeding what Norfolk Southern has expended in any other state) toward improving Ohio's rail system. Norfolk Southern has been and remains a good partner here, and it values and respects the relationships it has fostered throughout the State of Ohio, and with the ORDC, the ODOT, and the Commission in particular. In turn, Norfolk Southern certainly welcomes and appreciates the Commission's ongoing cooperation and assistance in resolving not only the instant concern but, further, any future concerns regarding rail-related construction projects, including assigned deadlines.

---

<sup>1</sup> Assuming the Commission is amenable, Norfolk Southern would welcome an informal conference with any interested parties (*e.g.*, the ORDC, the ODOT, and the Commission) toward discussing and resolving the concerns set forth in the above paragraph, and any related concerns.



Respectfully submitted,

EASTMAN & SMITH LTD.

D. Casey Talbott / By Mark Sandretto  
0059713

D. Casey Talbott (0046767)

Mark W. Sandretto (0079536)

One SeaGate, 24<sup>th</sup> Floor

P.O. Box 10032

Toledo, Ohio 43699-0032

Telephone: (419) 241-6000

Fax: (419) 247-1777

Attorneys for Norfolk Southern  
Railway Company

**PROOF OF SERVICE**

A copy of the foregoing *Application for Rehearing of the Commission's Entry of June 3, 2009* was mailed this 6<sup>th</sup> day of July, 2009, to: **Leah Thomas Dalton**, Deputy Chief, Transportation Department, Safety/Programs Rail, c/o The Public Utilities Commission of Ohio, 180 East Broad Street, Columbus, Ohio 43266-0573; **Susan J. Kirkland**, Manager, Safety Programs, Ohio Rail Development Commission, 1980 West Broad Street, 2<sup>nd</sup> Floor, Columbus, Ohio 43223; **Rick H. Ray**, Norfolk Southern Railway Company, 99 Spring Street SW, Box 123, Atlanta, Georgia 30303; and **City of West Carrollton**, 300 East Center Avenue, West Carrollton, Ohio 45449.

D. Casey Talbott / By Mark Sandretto  
0059713

Attorney for Norfolk Southern  
Railway Company

**D. Casey Talbott**

---

**From:** D. Casey Talbott  
**Sent:** Wednesday, May 27, 2009 10:59 AM  
**To:** 'Martin, George'  
**Subject:** RE: Project deadlines

george:  
i was just taking a look at it, and was intending to file something asap this afternoon.  
any suggestions?

---

**EASTMAN & SMITH LTD.**  
ATTORNEYS AT LAW

---

*Established 1844*  
Columbus - Toledo - Findlay

**D. Casey Talbott**  
*Attorney at Law*  
One Seagate 24th Floor  
P.O. Box 10032  
Toledo, Ohio 43699-0032  
419.247.1845 / Fax 419.247.1777  
[dctalbott@eastmansmith.com](mailto:dctalbott@eastmansmith.com)  
[www.eastmansmith.com](http://www.eastmansmith.com)

IRS CIRCULAR 230 NOTICE: We are required to advise you that any tax advice contained in this communication (including any attachments) is not intended to be used, and cannot be used, for the purpose of avoiding penalties imposed under federal tax law.

CONFIDENTIALITY NOTICE: This transmission is intended only for the addressee shown above. It may contain information that is privileged, confidential, or otherwise protected from disclosure. If you are not the intended recipient, please do not read, copy, or use it, and do not disclose it to others. Please notify the sender of the delivery error by replying to this message and then delete it from your system. Thank you.

---

**From:** Martin, George [mailto:George.Martin@puc.state.oh.us]  
**Sent:** Wednesday, May 27, 2009 10:48 AM  
**To:** D. Casey Talbott  
**Subject:** FW: Project deadlines

Casey

I have no idea whether you've been contacted or not, but this one does not bode well for an extension.

---

**From:** Ludovici, Matt J [mailto:matt.ludovici@nscorp.com]  
**Sent:** Wednesday, May 27, 2009 10:41 AM  
**To:** Golias, Conrad M.  
**Cc:** Ray, Rick H; Bankieris, Gus B; Vicari-Baker, Jeffrey J.; Martin, George; Klinkbeil, Richard W.  
**Subject:** RE: Project deadlines

Conrad per your request,

The I joints are 2ea. 105lb-RE 7"-7"-5"-7"-7" and 2 ea. 127lb-RE 5.5"-5.5"-5.5"-5.5"

6/29/2009

According to John Bentz who spoke with the track supervisor this morning , the joints will be installed next week.

Matt Ludovici

---

**From:** Golias, Conrad M.  
**Sent:** Wednesday, May 27, 2009 8:19 AM  
**To:** Ludovici, Matt J  
**Subject:** Re: Project deadlines

What size joint do we need? 105?? 127??  
2 joints  
Check with DE Ft Wayne first  
Cmg

---

**From:** Ludovici, Matt J  
**To:** George.Martin@puc.state.oh.us  
**Cc:** Martin, Ray A; Bankieris, Gus B; Vicari-Baker, Jeffrey J.; Bentz, John J; Freeby, Michael J.; Golias, Conrad M.; Ray, Rick H  
**Sent:** Wed May 27 07:38:12 2009  
**Subject:** FW: Project deadlines  
Good morning George,  
Sorry for not getting back to you yesterday. I was unaware Rick was out of the office until Monday. However I did speak with him. He will start the procedure for an extension. He will talk to the chief engineer of track first and then the supplier of the insulated joints. The crossing is completed with the exception of the I Joints.

---

**From:** Ludovici, Matt J  
**Sent:** Tuesday, May 26, 2009 1:26 PM  
**To:** Ray, Rick H  
**Cc:** Golias, Conrad M.; Vicari-Baker, Jeffrey J.; Freeby, Michael J.; Bentz, John J  
**Subject:** FW: Project deadlines

Rick please apply for a 60 day extension for Montgomery County, Kimberly Rd, DOT# 524-642M. The crossing is ready to be cut-in however the track department is waiting on a special insulated joint order for this location. They are two odd ball sizes 105lb and 127lb. An estimated date for delivery was requested.

Matt Ludovici

---

**From:** Martin, George [mailto:George.Martin@puc.state.oh.us]  
**Sent:** Tuesday, May 26, 2009 9:15 AM  
**To:** Ray, Rick H; Matt Ludovici; Bankieris, Gus B  
**Subject:** Project deadlines

Morning Rick,

We have two projects that are due in service on 5/28/09. Could you please provide a status on these?

Montgomery County, Kimberly Rd, DOT# 524-642M

Preble County, Swann Beatty Rd, DOT# 525-174Y

Thanks,  
George

## D. Casey Talbott

---

**From:** Ray, Rick H [rick.ray@nscorp.com]  
**Sent:** Monday, June 01, 2009 11:25 AM  
**To:** D. Casey Talbott  
**Cc:** Bankieris, Gus B; Martin, George; Susan.Kirkland@dot.state.oh.us; Golias, Conrad M.; Bentz, John J; Matt Ludovici  
**Subject:** 10 0219 In Service - 524642M Kimberly Lane. W.Carrollton OH

Note -- Project in service.

***'Dedicated to your Safety - Committed to mine'***

---

**From:** Bentz, John J  
**Sent:** Monday, June 01, 2009 11:22 AM  
**To:** Bankieris, Gus B; Ludovici, Matt J; Ray, Rick H; Vicari-Baker, Jeffrey J.  
**Cc:** Golias, Conrad M.  
**Subject:** RE: 524642M Kimberly Lane. W.Carrollton Ohio MP CJ 214.45

In Service 6-1-09. The crossing completion report will follow shortly

---

**From:** Bankieris, Gus B  
**Sent:** Monday, June 01, 2009 7:41 AM  
**To:** Ludovici, Matt J; Bentz, John J; Ray, Rick H; Vicari-Baker, Jeffrey J.  
**Cc:** Golias, Conrad M.  
**Subject:** FW: 524642M Kimberly Lane. W.Carrollton Ohio MP CJ 214.45

Jeff/Ludo/John,

Please let me know asap. Tks.

---

**From:** D. Casey Talbott [mailto:DCTalbott@eastmansmith.com]  
**Sent:** Monday, June 01, 2009 6:56 AM  
**To:** Bankieris, Gus B  
**Cc:** Ray, Rick H; Wainger, Jill K.  
**Subject:** FW: 524642M Kimberly Lane. W.Carrollton Ohio MP CJ 214.45

gus:  
please advise asap today once the crossing is placed in-service.  
i'll then follow with you, toward providing a quick update to the puco.

---

**EASTMAN & SMITH LTD.**  
ATTORNEYS AT LAW

---

*Established 1844*  
Columbus - Toledo - Findlay

D. Casey Talbott  
Attorney at Law

6/29/2009



One Seagate 24th Floor  
P.O. Box 10032  
Toledo, Ohio 43699-0032  
419.247.1845 / Fax 419.247.1777  
[dctalbott@eastmansmith.com](mailto:dctalbott@eastmansmith.com)  
[www.eastmansmith.com](http://www.eastmansmith.com)

IRS CIRCULAR 230 NOTICE: We are required to advise you that any tax advice contained in this communication (including any attachments) is not intended to be used, and cannot be used, for the purpose of avoiding penalties imposed under federal tax law.

CONFIDENTIALITY NOTICE: This transmission is intended only for the addressee shown above. It may contain information that is privileged, confidential, or otherwise protected from disclosure. If you are not the intended recipient, please do not read, copy, or use it, and do not disclose it to others. Please notify the sender of the delivery error by replying to this message and then delete it from your system. Thank you.

---

**From:** D. Casey Talbott  
**Sent:** Monday, June 01, 2009 6:54 AM  
**To:** 'Martin, George'  
**Subject:** RE: 524642M Kimberly Lane. W.Carrollton Ohio MP CJ 214.45

george:  
i'll follow with ns today re this, once in-service is confirmed.

---

**From:** Martin, George [<mailto:George.Martin@puc.state.oh.us>]  
**Sent:** Monday, June 01, 2009 6:52 AM  
**To:** D. Casey Talbott  
**Subject:** RE: 524642M Kimberly Lane. W.Carrollton Ohio MP CJ 214.45

Casey

You might want to officially docket the "in service" notification from NS including all measures NS took to expedite the completion of the project.

George

---

**From:** D. Casey Talbott [<mailto:DCTalbott@eastmansmith.com>]  
**Sent:** Friday, May 29, 2009 2:53 PM  
**To:** Martin, George  
**Subject:** RE: 524642M Kimberly Lane. W.Carrollton Ohio MP CJ 214.45

george:  
per further communications, i'm advised that ns hopes to have this crossing in service on monday, june 1, meaning ten days ahead of the date i sought via extension.  
is there anything i can or should do to protect its interests, in the interim?  
regardless, i'll advise further come monday.  
thanks george.

---

**From:** D. Casey Talbott  
**Sent:** Friday, May 29, 2009 7:24 AM  
**To:** 'Martin, George'  
**Subject:** RE: 524642M Kimberly Lane. W.Carrollton Ohio MP CJ 214.45

quick update:

6/29/2009

per ns, the insulated joints were installed yesterday (may 28).  
construction gang will be there on monday (june 1) toward placing this in service.

---

**From:** D. Casey Talbott  
**Sent:** Wednesday, May 27, 2009 5:03 PM  
**To:** 'Martin, George'  
**Subject:** RE: Project deadlines

george:  
as we'd discussed, see attached, as it's being filed.  
note that the request is for 14 days, as opposed to 30.  
thanks for discussing this with me, george, and for any assistance you can provide.  
and again, and on behalf of norfolk southern, i apologize for the timing of the request.

---

6/29/2009

## D. Casey Talbott

---

**From:** Ludovici, Matt J [matt.ludovici@nscorp.com]  
**Sent:** Monday, June 01, 2009 2:31 PM  
**To:** Freeby, Michael J.; George Martin; Gray, Patricia A.; Jeffrey Baker; Leah Dalton; mike.forte@dot.state.oh.us; Tim.Perkins@dot.state.oh.us; Quinn, Gary L; Reinhardt, Joseph; Rick Ray; Susan Kirkland; Tod Darfus ORDC PM  
**Cc:** D. Casey Talbott; Nemitz, Terry R.; Bentz, John J; Bankieris, Gus B; Grim, Tony E.  
**Subject:** ais. F10904, 524642M, Kimberley LN, W Carrollton, OH  
**Attachments:** ais. F10904, 524642M, Kimberley LN, W Carrollton, OH.pdf

We apologize for the delay.  
Thanks

*Matthew J. Ludovici.*  
*Material & Production Coordinator*  
*1200 Peachtree Street NE Box 123*  
*Atlanta, GA 30309*

*Office: (404) 527-2886*  
*Cell: (770) 891-9827*  
*Fax: (404) 653-3664*



Date: Jun 01, 2009  
File:  
New File #: CX0120701

Mr. George Martin  
Grade Crossing Planner  
Safety Programs Division/Rail  
Public Utilities Comm. of Ohio  
180 East Broad Street  
Columbus, OH 43215-3793

Mr. Martin:

Rail/Highway grade crossing warning devices were modified and placed  
in service at the following location on this date June 1, 2009, @ 12:01PM:

Order #: 08-0574-RR-FED  
Street: KIMBERLY LN.  
City: WEST CARROLLTON  
County: MONTGOMERY  
DOT: 524642M  
MilePost: CJ-214.45-SP  
New(N)/Upgrade (U): N  
Type of Equipment: FLASHERS W/GATES  
In-Service Date: Jun 01, 2009  
Project Requested By: State

Sincerely,

B.L. Sykes

cy: Patricia Gray - Supervisor Misc. Billing, Roanoke

2009

Date: Jun 01,

CX0120701

File:  
New File #:

Ms. Susan Kirkland  
Supervisor  
Ohio Rail Development Comm.  
Ohio DOT  
50 W. Broad St., 15th Floor  
Columbus, OH 43216-0899

Ms. Kirkland:

Rail/Highway grade crossing warning devices were modified and placed  
in service at the following location on the date shown:

State Project #:  
Order #: 08-0574-RR-FED  
Street: KIMBERLY LN.  
City: WEST CARROLLTON  
County: MONTGOMERY  
DOT: 524642M  
MilePost: CJ-214.45-SP  
New(N)/Upgrade (U): N  
Type of Equipment: FLASHERS W/GATES  
In-Service Date: Jun 01, 2009  
Project Requested By: State

Sincerely,

B.L. Sykes

cy: Patricia Gray - Supervisor Misc. Billing, Roanoke

**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Authorization of	)	
Wheeling and Lake Erie Railway and Norfolk	)	
and Southern Railway to Construct Active	)	Case No. 08-574-RR-FED
Grade Crossing Warning Devices in	)	
Crawford, Preble, and Montgomery Counties.	)	

**ENTRY**

The Commission finds:

- (1) By entry of May 28, 2009, the Commission, in part, ordered Norfolk Southern Railway (NS) to install active grade crossing warning devices at the Kimberly Road grade crossing (524-642M), located in the city of West Carrollton, Montgomery County. The Commission directed that the construction of active warning devices at the grade crossing be completed by May 28, 2009.
- (2) Section 4905.47, Revised Code, provides, in relevant part, that any person owning or operating a railroad and neglecting or refusing to erect or maintain such gate, automatic alarm bell, or other mechanical device when required by the Commission, shall forfeit to the state, for every such neglect or refusal, one thousand dollars for each day such neglect or refusal continues.
- (3) On May 28, 2009, NS filed a request for a 14-day extension of the construction deadline. NS states that the project is nearly completed and the only aspect of the project remaining is for NS to install the insulated joints and then hang the gates and activate and test the detection circuitry. NS indicated that "there appears to have been a communication breakdown with Norfolk Southern and accordingly this issue did not surface until Tuesday, May 26."
- (4) On May 28, 2009, Commission staff filed a memo recommending that the extension of time not be granted. According to staff, they received a construction start notice for this project on March 13, 2009, stating that work would commence on this project on March 16, 2009, and that this should have allowed more than sufficient time for the project to

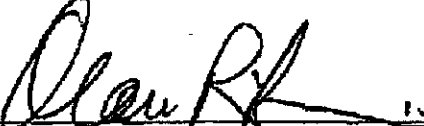
be placed in service. Staff also noted that, during a teleconference with NS on May 6, 2009, it inquired as to the status of the project and followed up with electronic mail, but never received a response. Staff also indicated that subsequent to the teleconference, it inquired on May 26 and 27, 2009 on the status of the project and was notified that NS intended to request an extension of time due to the lack of insulated joints.

- (5) The Commission order issued in this case clearly directed NS to complete the project no later than May 28, 2009. The Commission established a procedure for entertaining requests for extensions of time to complete grade crossing installation projects. The Commission's policy with respect to extensions of time in grade crossing project cases requires that all requests for extensions be filed by the railroad in sufficient advance of the ordered installation date to allow for Commission action on the request and to clearly state the reasons prompting the request.
- (6) In this case, NS has neither timely filed its extension request nor clearly stated the reasons prompting the request. Such inaction by NS violates Commission policy as well as its rules and regulations.
- (7) On June 2, 2009, staff advised the attorney examiner that, on June 1, 2009, NS had placed the active grade crossing warning devices at the project crossing in service.
- (8) NS is hereby put on notice that, in the future, all grade crossing improvement projects are to be completed, absent extraordinary circumstances, in the time set forth by the Commission. In the event NS fails to timely complete a grade crossing project in the future as ordered by the Commission, the Commission will consider imposing a civil forfeiture pursuant to Section 4905.47, Revised Code.

It is, therefore,

ORDERED, That a copy of this entry be served upon NS and its counsel; the mayor of West Carrollton, Ohio; the Ohio Rail Development Commission; and all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

  
Alan R. Schriber, Chairman

  
Paul A. Centolella

  
Ronda Hartman Fergus

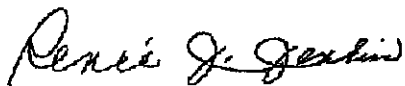
  
Valerie A. Lemmie

  
Cheryl L. Roberto

SEF:ct

Entered in the Journal

JUN 03 2009

  
Renee J. Jenkins  
Secretary